

February 7th, 1959

COCOM Document No. 2869.81

COORDINATING COMMITTEE

5 General

RECORD OF DISCUSSIONONREVISION OF THE STRATEGIC EXPORT CONTROLS - EXCEPTIONS PROCEDURESJanuary 26th, 1959

Present: Belgium(Luxembourg), Canada, Denmark, France, Germany, Italy, Japan, Netherlands, United Kingdom, United States.

References: CH/1547, COCOM 471(Revised), 1473, 2869.5, 2869.13, 2869.55, 2869.62, 2869.75, 2869.77, 2869.79, 3230 and 3338.

1. The CHAIRMAN opened the discussion by referring to the joint proposal submitted by the Belgian, United Kingdom and United States Delegations for revising the COCOM 471 procedure. In order to clarify the situation he invited Delegates to try to secure the approval of their authorities on the joint text as recorded in paragraph 2 of COCOM 2869.77 with substitution of the word "situation" for the word "well-being". The text to be considered was therefore as follows:

"Subject to the special considerations laid down in the Committee's Principles and Procedures, exceptions to the general rule of embargo in respect of List I items will be made, after full consideration by the Committee, only when refusal to permit the export is deemed to involve a risk of damage to the economic, political or social situation of the exporting country, of a nature so serious as to override the security considerations involved."

He then invited Delegates to give the further views of their authorities on the revision of the "de minimis" procedure.

2. The GERMAN Delegate put forward the following suggestion for a new sub-paragraph to be inserted in Annex A of 1473:

"New sub-paragraph

(to be inserted after present sub-paragraph (b)).

"For exception requests of medium value or quantity submitted under this procedure, a date for discussion in the Committee will be fixed. The requesting country has to show the particular circumstances underlying the individual case due to which the planned export does not incorporate any extractable unique technological know-how and will not endanger the embargo policy."

"(See Protocol of Understanding COCOM .....)"

Protocol of Understanding

"Agreement has been reached in the Committee on the understanding that "de minimis" cases are such exception cases which, in accordance with the proper wording of the introductory note in Annex A to COCOM Doc. 1473, constitute an unimportant strategic risk.

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"Thus, the procedure for the "de minimis" cases is applicable also to exception requests concerning transactions of medium monetary value or quantity, provided that the requesting country can show satisfactorily that due to the particular circumstances of the individual transaction, the suggested export is of no strategic importance and does not incorporate any extractable unique technological know-how, although the status of the items involved is not contested."

He emphasised that he was putting this text forward as a working paper in order to stimulate discussion rather than as a formal proposal. The principle underlying this suggestion was more important than the actual wording he had used and he was willing to consider any editorial amendment. He pointed out that it made no mention of the value cut-off: this could be left to be discussed in the Committee when particular cases were submitted. Furthermore, instead of a deadline for the presentation of views as existed under the present procedure, he proposed automatic discussion in the Committee on any exception request. He realised that Delegations would require time to study this suggestion but he would be interested in hearing their preliminary comments.

3. The JAPANESE Delegate referred to the comments which had been made by his German colleague on the statement made by the Japanese Delegation on January 19th (COCOM 2869.79 paragraphs 2-6). The Japanese position was that the present procedures were considered sufficient to take care of any cases which had so far been cited in support of proposals for broadening the "de minimis" procedure. The German Delegation had mentioned three particular cases: as far as the export of cobalt alloy rods to Chin was concerned (CH/1547) the Japanese authorities considered that this was a genuine accident of definition case and the Danish and United Kingdom Delegates held the same view. The proposal to export an electronic measuring instrument to Hungary (COCOM 3338) concerned equipment worth \$2,978: this had been treated by the Japanese authorities as a genuine "de minimis" case which did not show a need to broaden the procedure. The third case referred to by the German Delegate was the export of a teletype transmitting and receiving set to Rumania (COCOM 3230). It had been argued that the equipment would be used to provide Western news in the Soviet Bloc and in addition it was of no strategic importance. The Japanese authorities considered that the first was a political reason and therefore the ad hoc procedure was appropriate while the second reason could be considered under the accident of definition procedure. Thus in the opinion of the Japanese authorities the cases mentioned by the German Delegation did not justify the need to broaden the "de minimis" procedure because all the arguments so far put forward could be taken care of either by the existing procedures of by the ad hoc procedure.

4. Commenting on the latest German suggestion (paragraph 2 above) the Japanese Delegate said that it took the views of his Delegation into consideration and seemed to be an improvement on the present position. It was his understanding that, under the German suggestion, a Delegation could not submit a "de minimis" case by simply saying that in their opinion the transaction in question was of no strategic importance; it could only refer a case to the Committee when there were particular circumstances, such as political needs, humanitarian reasons, safety of Free World aircraft, etc., involved. He asked the German Delegate to confirm this understanding and undertook to report the German suggestion fully to his authorities.

5. The DANISH Delegate stated that he was sceptical as to the practical consequences of the German suggestion. It had been claimed that there would be few "de minimis" cases under the new procedure and, if this was so, he agreed with the Japanese Delegate that the ad hoc procedure was sufficient, as a supplement to the special cases for which definite characteristics had been drawn up. He felt that the German suggestion involved some dangers; the German Delegate had previously stated (COCOM 2869.79 paragraph 19)

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that the danger of creating precedents also existed for 471 exceptions and had quoted the case of unemployment in the ship-building industry which would probably affect several Member Countries in the same way: the Delegate felt, however, that the possibility of precedents was much greater as far as the new German proposal was concerned for the very simple reason that no concrete criteria could be established for this kind of procedure.

6. The UNITED STATES Delegate said that he was grateful to his German colleague for having taken account of the previous views which the United States Delegation had expressed. Before commenting further, he asked if it was correct to assume that if the new German text were inserted after sub-paragraph (b), the heading would remain unchanged.

7. The GERMAN Delegate confirmed that there would be no change in the heading of Annex A of COCOM L473 and that the text he suggested might best be incorporated as a new sub-paragraph (c). The substance of the present sub-paragraph (c) could be incorporated in sub-paragraph (b). Referring to the Japanese Delegate's comments, he stated that the submission of a case to the Committee would not question the embargo status of the item concerned. The submitting Delegation would have to put forward the reasons why the proposed transaction would not constitute a security risk.

8. The JAPANESE Delegate said that he thought that there was still some difference in the area covered between the original German proposal and the suggestion which had been made today. In the beginning the German Delegate had said that it could be argued that any case of relatively high monetary value could be submitted to the Committee if it were of little strategic importance. Now it seemed that cases could be submitted only if they involved particular circumstances.

9. The GERMAN Delegate said there had perhaps been some misunderstanding from the beginning. His Delegation had never wished to introduce the argument that a particular item was of no strategic value. The misunderstanding had probably arisen because he had tried to make his case by referring to List I items. As the United Kingdom Delegate had mentioned, List I contained a range of strategic importance, but the Committee had agreed to consider all of them as strategic. He wished to make it clear that an exception request would be submitted on the basis of the particular circumstances of the transaction in question. The German authorities were trying to find a procedural solution to the problem: they did not like continual use of the ad hoc procedure and thus they were proposing this solution to close this gap in the Committee's procedures and their proposal incorporated all possible safe-guards to avoid misuse.

10. The JAPANESE Delegate agreed that the reference should be to the strategic importance of the transaction and not to that of the item concerned. He observed that if a Delegation had serious doubts as to the status of the item a redefinition proposal was usually made at the time the exception request was submitted. He understood that the German idea was to regularise part of the procedure which had taken place in the past on an ad hoc basis and he stressed that the particular circumstances must be mentioned when the submission was made.

11. The DANISH Delegate, referring to the question of the particular circumstances to be brought forward in support of an exception request, said that in his opinion the only concrete justification that had so far been mentioned was the end-use of the equipment involved in the transaction. This factor, however, could not of itself be sufficient reason for authorising the export of a List I item.

12. The UNITED STATES Delegate said that he wondered what the new German suggestion added to the existing procedure. In his opinion the introductory paragraph (a) was still the controlling paragraph. The new German suggestion said that a date would be fixed for the discussion of the case in the Committee but he had always assumed that this was so. He felt that the phrase "any

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extractable, unique technological know-how" was already covered by the phrase "of no consequence from the strategic point of view" in the heading to Annex A of COCOM 1473. He asked what the phrase "will not endanger the embargo policy" added to the meaning of the paragraph. Referring then to the "Protocol of Understanding" the Delegate said that he saw no reason for the statement of principle that such cases did "constitute an unimportant strategic risk" when the heading to Annex A, to which he had already referred, spoke of "no consequence from the strategic point of view". The second paragraph also referred to transactions "of no strategic importance", which was again covered by the introductory paragraph. He said that he thought the new German suggestion added only one new element, the consideration of transactions of medium value or quantity. He did not wish to discuss actual figures but he reiterated that some figures which had been mentioned in previous discussions had given difficulty to his authorities. He would like to know if it was the German intention that in futuro, if the German proposal were adopted, ad hoc cases would be inadmissible.

13. The GERMAN Delegate stressed once more that he was willing to alter the wording he had put forward. What he had tried to do in submitting his suggestion was to put down the essential ideas. Replying then to the United States comments, he pointed out that under the present minimum shipments procedure no discussion in the Committee was provided for, whereas the German authorities were prepared to foresee an automatic Committee discussion of such cases and not simply a deadline for the presentation of observations. It was certainly his intention to fill the gap in the ad hoc procedure although he realised that it was not possible to foresee if this would take care of the problem in the future but for the moment he envisaged that all cases could be presented either under this "de minimis" procedure or under the new 471 procedure. Technical know-how had been mentioned in order to make the proposal on cases of medium monetary value more acceptable to the Committee, although he was prepared to omit such a reference if the Committee preferred not to include it.

14. The ITALIAN Delegate said that, as he had stated repeatedly in the course of the previous meetings, his authorities agreed with the gist of the German suggestion and also that it would replace the ad hoc procedure for most cases. His authorities wanted to see a coherent scheme of rules drawn up to cover all kinds of exceptions.

15. The UNITED KINGDOM Delegate said he felt that the longer the discussion continued the more it emphasised the very small differences which now existed. The United States Delegation had confirmed at the last meeting that they would not reject requests on the grounds of value alone. They seemed to want to avoid establishing a new procedure while the German Delegation seemed anxious to reduce the number of ad hoc cases and the Japanese Delegation favoured the accident of definition procedure. None of these approaches would affect the total number of exceptions cases submitted to the Committee. The only point at issue seemed to be whether to establish a procedure in writing to record the general understanding that minimum shipment cases would not be rejected because of value alone. In this respect he thought that his authorities would probably accept a written confirmation of this understanding but he was not sure whether this was wanted, for it seemed that the essential points were covered in COCOM 2869.79. He suggested that Annex A to COCOM 1473 should be left unchanged apart from the deletion of the reference to "minimum shipments or trivial exceptions", leaving a simple phrase, "List I exceptions of the "de minimis" type", which would afterwards be defined in two parts: above and below the agreed cut-offs.

16. The FRENCH Delegate agreed with his United Kingdom colleague that agreement was near. He accepted the broad lines of the new German suggestion and he considered that he could recommend its acceptance to his authorities.

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17. The CHAIRMAN then proposed the following text which he thought incorporated the points on which there was general agreement and which he hoped would prove unanimously acceptable:

"Exceptions requests with a monetary value or a quantity above a minimal level will be considered by the Committee in the particular cases when the exporting country could show special circumstances that make the export of no consequence from the strategic point of view. Such cases will be discussed in the Committee."

18. After a short discussion, the COMMITTEE agreed that the text proposed by the Chairman seemed likely to find general acceptance and all Delegations, having thanked the Chairman for his valuable initiative, undertook to report it back to their authorities. It was decided to continue the discussion on February 9th.

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